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No. 87-925

In The

Supreme Court of the United States

October Term, 1987

LAWRENCE J. GALARDI
Petitioner,

vs.

THE STATE BAR OF CALIFORNIA
Respondent,

Petition for Writ of Certiorari
to the Supreme Court of California

RESPONDENT'S BRIEF IN OPPOSITION

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTION PRESENTED

Whether petitioner, a member of the California Bar, may now urge in proceedings before this Court that a judgment of the California Supreme Court, imposing as a condition of probation in an attorney disciplinary proceeding an order for payment of restitution to a person who was not a client of petitioner, but to whom petitioner owed a fiduciary duty, violates the Supremacy Clause of the United States Constitution because the debt underlying the order of restitution was discharged in United States Bankruptcy Court proceedings if:

1. Petitioner did not previously object to the restitution order on Supremacy Clause ground in proceedings before the California Supreme Court;

2. Amicus curiae (on behalf of petitioner) who did argue the matter

before the California Supreme Court (petitioner made no appearance at the oral argument) argued that the period of suspension recommended by The State Bar of California should be reduced by the Court in order to allow petitioner to make restitution; and

3. The California Supreme Court, in apparent reliance on petitioner's expressed wish to make restitution, did reduce the actual period of suspension from one (1) year actual suspension to thirty (30) days so that petitioner could make such restitution.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, The State Bar of California, respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the California Supreme Court's order for payment of restitution in connection with

the imposition of discipline against a California attorney in Lawrence J. Galardi v. The State Bar of California (43 Cal.3d 683 (1987)

The California Supreme Court, by order dated August 3, 1987, ordered that petitioner be suspended from the practice of law for a period of one year, that execution of suspension be stayed and that petitioner be placed on probation for five (5) years subject to certain conditions including actual suspension of thirty (30) days and payment of restitution to two of petitioner's co-venturers in the amount of $85,000 and $101,000, respectively. (Petitioner's Appendix B-12) By order dated September 2, 1987, the California Supreme Court denied petitioner's Petition for Rehearing.

I

STATEMENT OF FACTS

The facts essential to this proceeding areas follows:

Petitioner was admitted to the practice of law in California on May 14, 1971. He had previously been admitted to the practice of law in New York in June 1959.

In or about 1977, petitioner entered into a joint venture agreement with John Taylor. In or about 1978, petitioner entered into a separate joint venture agreement with Bernie Lerner. The purpose behind the agreements was to improve and sell two parcels of land in Malibu, California. Taylor invested $85,000 and Lerner $101,000 in their respective joint ventures with petitioner. Petitioner thereafter used funds secured by the joint venture properties for purposes unrelated to the

joint venture agreements, failed to notify or obtain the consent of his co-venturers prior to taking out several loans which encumbered the joint venture properties to the detriment of the joint venture agreements and, in the Lerner matter, failed to provide an accounting of all funds disbursed in connection with the property. Eventually, both properties were foreclosed and both Taylor and Lerner lost their entire investments.

Petitioner subsequently sought to discharge his debts in bankruptcy. On December 23, 1983, the United States Bankruptcy Court, Central District of California, entered its decision in Taylor v. Galardi (L.A. 81-00606-RS) and discharged the debt owed by petitioner to Taylor. On January 24, 1985, the United States Bankruptcy Court, Central District of California, entered its decision in Lerner v. Galardi (L.A. 81-0656-BR). The

court refused to discharge the Lerner debt and concluded, inter alia, that a fiduciary relationship existed between petitioner and Lerner and that petitioner breached his fiduciary obligation in that he misappropriated certain joint venture funds.

A Hearing Panel of the State Bar Court[1] recommended that petitioner

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[1] In California, the State Bar Court contains numerous Hearing Panels which take evidence, make findings of fact and, if appropriate, recommendations of discipline. There is also one Review Department which reviews Hearing Panel decisions and either adopts or (after giving the parties an opportunity to be heard) modifies the Hearing Panel's decision. The final disciplinary recommendation of the State Bar to the Supreme Court is that of the Review Department. (Cal. Bus. & Prof. Code, § 6086.) The member may thereafter seek review of the State Bar's recommendation in the California Supreme Court. Once review is granted, the California Supreme Court conducts an independent examination of the entire record, weighs the evidence and passes upon its sufficiency. Alberton v. State Bar, 37 Cal.3d 1, 11 [206 Cal.Rptr. 373, 686 P.2d 1177] (1984). The ultimate determination as to the degree of discipline to be imposed is made by the California Supreme Court. McCray v. State Bar, 38 Cal.3d 257, 272 [211 Cal.Rptr. 691, 696 P.2d 83] (1985).

receive a private reproval. The Review Department recommended that petitioner be suspended from the practice of law for a period of three (3) years, that execution of suspension be stayed, and that petitioner be placed on probation for such period, subject to certain conditions including actual suspension of one (1) year and until restitution of $166,000 had been made to his co-venturers. The California Supreme Court, in its decision, expressed concern that the Review Department's recommendation would prevent petitioner from ever returning to the practice of law because it would be unlikely that petitioner would be able to comply with restitution requirements if he could not practice law. (Petitioner's Appendix B-11, B-12) The California Supreme Court concluded that the appropriate discipline be formulated to give petitioner an adequate opportunity to

repay his obligations. The Court ordered that petitioner be suspended for one (1) year, that execution of suspension be stayed, and the petitioner be placed on probation for five (5) years with only thirty (30) days' actual suspension. The conditions of probation required, inter alia, that petitioner pay restitution in the amount of $101,000 to Bernie Lerner and $85,000 to John Taylor over the five (5) year probationary period.[2]

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[2] At oral argument before the California Supreme Court, petitioner did not make an appearance but requested that amicus curiae on his behalf be allowed to address the Court for the entire period. Amicus suggested to the Court that petitioner should repay the debts and that it would be reasonable to expect petitioner to do so within a five (5) year period. The Court agreed and, accordingly, adopted the aforementioned degree of discipline. (Petitioner's Appendix B-12)

II

ARGUMENT

PETITIONER HAS WAIVED ANY OBJECTION BASED ON THE SUPREMACY CLAUSE TO PAYING RESTITUTION ARISING FROM THE IMPOSITION OF DISCIPLINE.

Petitioner's principal argument appears to be that since the $85,000 debt to Taylor was discharged in bankruptcy, restitution to Taylor is barred by the Supremacy Clause of the United States Constitution. U.S. Const., art. VI. The Lerner debt does not appear to be at issue since it was not discharged in bankruptcy.

At no point throughout the State Bar disciplinary proceeding or before the California Supreme Court did petitioner object to the State Bar's restitution recommendation on this ground. No mention was made of this issue before the State Bar Court nor by petition in brief or oral argument before the California Supreme Court. Petitioner's brief did refer to the bankruptcy proceedings, but only to

support his contention that the Taylor agreement was not a joint venture agreement and did not, therefore, involve a fiduciary relationship. The only time the supremacy argument was raised was in a brief filed by amicus curiae. The California Supreme Court, in its decision, noted amicus' argument but held that since petitioner had not objected to the State Bar's restitution recommendation on Supremacy Clause grounds, petitioner had waived any objection to restitution based on the Supremacy Clause. See Fay v. Noia, 372 U.S. 391, 475, 83 S.Ct. 822, 867 (1963); Yakus v. United States, 321 U.S. 414, 64 S.Ct. 660, 667 (1944); Henderson v. Duncan, 779 F.2d 1421, 1425 (9th Cir. 1986); Frommhagen v. Klien, 956 F.2d 1391, 1395 (9th Cir. 1972).

Furthermore, although amicus argued in his brief that the Supremacy Clause barred restitution of the Taylor debt, at oral

argument before the California Supreme Court, amicus suggested to the Court that petitioner should repay the money that John Taylor and Bernie Lerner contributed to the real estate ventures. (Petitioner's Appendix B-12)

The California Supreme Court agreed with the oral suggestion of amicus and reduced the discipline imposed so as to allow petitioner to continue to practice law and repay the money he owed Taylor and Lerner. (Petitioner's Appendix B-12)

Petitioner has completed the thirty (30) day period of actual suspension imposed by the California Supreme Court and has, in essence, decided that he does not want to comply with the probationary terms. Petitioner should not now be permitted to reframe the discipline imposed by the California Supreme Court because of a constitutional objection he did not once raise throughout the entire disciplinary

proceedings. Petitioner, by his apparent lack of objection to discipline requiring payment of restitution, obtained a substantial reduction in the actual suspension imposed. He would eat his cake and keep it, too. He should not succeed.

III

CONCLUSION

The decision below was decided in accord with constitutional principles.

The petition for the Writ of Certiorari should be denied.

Dated: December 31, 1987

Respectfully submitted,

Diane C. Yu
Truitt A. Richey, Jr.
Richard J. Zanassi

By
Truitt A. Richey, Jr.
Counsel of Record

Attorneys for
The State Bar of California

DECLARATION OF SERVICE BY MAIL

I, Chiyeko Kimura, declare as follows:

I am a citizen of the United States and a resident of the County of San Francisco. I am over the age of eighteen years and not a party to the within entitled action. My business address is 555 Franklin Street, San Francisco, California 94102. On February 1, 1988, I served the within

RESPONDENT'S BRIEF IN OPPOSITION

on the interested parties by placing a true copy thereof enclosed in a sealed envelope with first-class postage thereon fully prepaid in the United States mail at San Francisco, California, addressed as follows:

Lawrence J. Galardi
11755 Wilshire Boulevard
Suite 1370
Los Angeles, California

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration is executed this 1st day of February, 1987 at San Francisco, California.